Supreme Court, U. S.
FILED
OCT 2 1975
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

No. 75-508

EMIL W. KAESERMAN,

Petitioner

vs.

THE UNITED STATES,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITION ON BEHALF OF EMIL W. KAESERMAN, PETITIONER

VINCENT P. McCAULEY
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IN THE SUPREME COURT OF THE UNITED STATES

_____ Term, 1975

No. _____

EMIL W. KAESERMAN, Petitioner

vs.

THE UNITED STATES, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner requests that a Writ of Certiorari issue to review the decision of the United States Court of Claims in this case (No. 292-69) which was entered on June 27, 1975.

Petitioner shows to the Court that he has filed his Motion for Re-Hearing to Alter the Judgment of the Court of Claims and Brief in Support thereof in the Court of Claims along with his Motion for Leave to file the same out

of time, the said Motions having been filed on the 25th day of September, 1975. Petitioner further shows that because the said Motions now before the Court of Claims were filed out of time, he is filing his Petition with this Court to protect his remedy in this Court, in that the Judgment of the Court of Claims of June 27, 1975, might be considered the Final Judgment of that Court since the Motion for Re-Hearing was filed out of time therein.

OPINION BELOW

The June 27, 1975, Opinion of the Court of Claims will be reported in _____ Ct. Cl. _____; _____ F 2d _____(1975).

JURISDICTION

The Opinion of the United States Court of Claims was entered on June 27, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1255 (1).

QUESTIONS PRESENTED

Whether the Court below was correct in holding:

1. The Army Board for the Correction of Military Records was not arbitrary and capricious in recommending the denial of Petitioner's claim, despite the fact that the Office of the Surgeon General finally admitted that Petitioner was, in fact, physically disqualified on October 19, 1948.
2. The Army Board for the Correction of Military Records was not arbitrary and capricious in recommending the denial of Petitioner's claim, based on the assertions that there was little need to recall officers of the Petitioner's specialty in 1948 and that it was doubtful that the Petitioner would have been recalled

under any circumstances.

3. The Army Board for the Correction of Military Records was not arbitrary and capricious in recommending the denial of Petitioner's claim, based on the reasoning that it was impossible to determine what grade the Petitioner would have attained had he been allowed to retain his commissioned status.

STATUTORY PROVISIONS INVOLVED

10 U.S.C. 1201 provides in its' pertinent parts that:

> "Upon a determination by the Secretary concerned that a member of a regular component . . . is unfit to perform the duties of his office, grade, rank or rating

> because of physical disability incurred while entitled to basic pay, the Secretary may retire the number, . . ., if the Secretary also determines that -
>
> (1) based upon accepted medical principles, the disability is of a permanent nature;
>
> (2) . . . and
>
> (3) either -
>
> (a) the member has at least 20 years of service computed under Section 1208 of this title; . . . ."

The pertinent provision of 10 U.S.C. 1552 (a) is:

> "The Secretary of a military department, under procedures established

by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. Under procedures prescribed by him, the Secretary of the Treasury may in the same manner correct any military records of the Coast Guard. Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States."

Further, the applicable provisions of 10 U.S.C. 1372 are:

"Unless entitled to a higher retired grade under some other

provision of law, any member of an armed force who is retired for physical disability under section 1201 or 1204 of this title, . . ., is entitled to the grade equivalent to the highest of the following:

(1) . . . .

(2) The highest temporary grade or rank in which he served satisfactorily, as determined by the Secretary of the armed force from which he is retired.

(3) . . . .

(4) . . . ."

STATEMENT OF THE CASE

1. BACKGROUND:

On May 22, 1946, while serving on active duty as a Major in the Army of the United States

the Petitioner appeared before an Army Retiring Board at Lawson General Hospital, Atlanta, Georgia. At such time, there was a diagnosis made of a herniated nucleus pulposus, and he was placed on six months temporary limited duty with a re-evaluation to be made. In February 1947, a disposition board at Oliver General Hospital, Augusta, Georgia, made a diagnosis of chronic mild lumbo-sacral sprain and found the Petitioner qualified for full duty. Thereafter, in May 1948, Petitioner requested and was granted relief from active duty.

In June 1948, the Petitioner requested extended service duty in the grade of Captain, which was the highest rank for which such application could be made at the time, and in connection therewith underwent a physical examination at such time. On September 16, 1948, following such examination, Petitioner was informed by the Adjutant General that,

"Your medical history reveals that you do not meet the physical requirement for extended active duty." ,

and his request was denied.

Further, Petitioner underwent physical examination at Walter Reed Army Hospital in October, 1948, for the specific purpose of recall to active duty in commissioned status, and the Medical Board there denied such recall due to the finding of a herniated nucleus pulposus. This finding was approved by the Surgeon General on October 19, 1948.

In a subsequent communication, Petitioner was advised on November 30, 1948, that his "History of herniated disc is considered to be disqualifying for extended active duty." In the meantime, on July 13, 1948, Petitioner had enlisted in the regular Army as Master Sergeant.

Petitioner was retired from the military service on January 1, 1966, for length of service. Prior thereto he was given a final type physical examination which revealed degenerative joint disease of the cervical and lumbar spine. Following such examination and upon retirement, Petitioner was given a thirty (30) per cent disability by the Veteran's Administration.

Until this proceeding was instituted in June of 1969, the Petitioner had continously since 1950, made requests for consideration of the decision of his case by an Army Evaluation Board or some suitable tribunal of similar nature. While the Petitioner was still on active duty the latest request in this regard was made in 1965, with a further request made in 1966, after he was retired. All of Petitioner's request for consideration by a physical evaluation board were denied with the

contention that he was physically fit for retention on active duty, regardless of his medical history and special duty limitations.

2. PROCEEDINGS IN COURT OF CLAIMS:

The Petitioner brought suit in the Court of Claims on or about June 25, 1969, pursuant to the provisions of 10 U.S.C. 1552 (a). He prayed that: (a) he be held entitled to disability retirement in the grade of Major, as of May 1946, and be entitled to compensation in the approximate sum of Forty-Eight Thousand ($48,000.00) Dollars, or such sum as a computation would have shown him entitled to; or, (b) in the alternative that he be declared entitled to disability retirement as of January 1, 1966, and that his additional compensation therefore be computed and that he be awarded the same.

The Defendant filed its originial Motion for Summary Judgment with the Court on March 7, 1972. This Motion was opposed by the Petitioner in his pleadings on May 3, 1972;

and subsequently the Court of Claims denied the Defendant's Motion for Summary Judgment on September 29, 1972.

The Petitioner filed his Motion for Summary Judgment on or about November 29, 1972. The Defendant's second Motion for Summary Judgment was made on January 26, 1973. The case was argued in Washington before the Court of Claims on May 1, 1973. The Court of Claims remanded the case to the Army Board for the Correction of Military Records on June 1, 1973, having concluded that there were issues which that body needed to resolve prior to any final determination by the Court of Claims. 202 Ct. Cl. 1081.

Thereafter, on April 17, 1974, the case was orally argued before the Army Board for the Correction of Military Records in Washington.

After finally receiving the decision from the Army Board for Correction of Military Records, the Petitioner made a request for Review of the Army Board for Correction of Military Records' decision by the Court of Claims on October 10, 1974.

On June 5, 1975, the case was heard again in oral argument before the Court of Claims in Washington. On June 27, 1975, the Court of Claims granted the Defendant's Motion for Summary Judgment and denied the Petitioner's Motion for Summary Judgment, and accordingly dismissed the Petitioner's Complaint.

The Petitioner filed this Motion for Re-Hearing to Alter the Judgment of the Court of Claims and Brief in Support thereof, along with his Motion for Leave to file his Motion for Re-Hearing, the same being out of time, on September 25, 1975.

REASONS FOR GRANTING THE WRIT

(All references herein are keyed to the Record of Exhibits in the Court of Claims.)

I. THE EVIDENCE BEFORE THE COURT OF CLAIMS SHOWS THAT PETITIONER WAS PHYSICALLY DISABLED ON OR BEFORE OCTOBER 19, 1948.

On October 19, 1948, the Office of the Surgeon General determined that Petitioners was physically disqualified for active duty as an Officer in the United States Army. (See Plaintiff's Exhibit #P-4).

The Office of the Surgeon General concluded on April 14, 1965, that their rating of the Plaintiff of October 19, 1948 as being physically disqualified was erroneous, because, in the words of the Surgeon General, . . ."a reasonable conclusion is that Sgt. Kaeserman was erroneously found medically disqualified for active duty as an officer several times

in 1948, 1950, and 1951 because of a doubtful diagnosis." The Surgeon General went further to say that . . . "Sgt. Kaeserman was also found medically disqualified for active duty as an officer because of administrative errors. . .". (See Defendant's Motion for Summary Judgment, filed March 7, 1972, Exhibit LLL, pp. 1 and 2, paragraphs 4 and 7.)

Finally, the Office of the Surgeon General reported to the Army Board for the Correction of Military Records (on January 31, 1974) that their office's rating of Petitioner in 1948 was incorrect. The Army Board for the Correction of Military Records obviously accepted this 1974 report from the Office of the Surgeon General, making it one of its' conclusions. (See Proceedings and Decision filed by Army Board for the Correction of Military Records, decided April 17,1974,

filed October 18, 1974, page 7, Board Conclusion #1) The Petitioner is unable to refer specifically to the 1974 report of the Surgeon General, the same having never been filed in Court or presented for Petitioner's inspection. The only reference to the report is contained in the Proceedings and Decision filed by the Army Board for Correction of Military Records, decided April 17, 1974, and filed October 18, 1974, page 6, Board Finding #2z.

The Petitioner contends that the evidence, even when viewed most favorably for the Respondent, shows that he was physically disabled on October 19, 1948. The actions of the Army Board for Correction of Military Records, in not recommending that Petitioner's application for correction of military records be approved, concerning the issue of Peti-

tioner's physical disability, were arbitrary and capricious. This is true in view of 10 U.S.C. 1552 (a), since it is apparent that not only do errors exist in Petitioner's Military Records, but injustices to Petitioner have also resulted which have not been rectified. The action of the Court of Claims in dismissing Petitioner's Complaint based on the Board's recommendation concerning the above issue is unjustified, and can only be corrected by the granting of this Writ.

II. IN 1948, THERE WAS A POSITION OPEN IN THE UNITED STATES ARMY FOR AN OFFICER OF PETITIONER'S SPECIALTY.

The Army Board for Correction of Military Records, in its' proceedings of April 17, 1974, stated:

"2. That disregarding the applicant's physical condition, had he not been denied recall to active duty as a commissioned officer in September 1948 for medical reasons, there would appear to have been little need to recall officers of his grade and military occupational specialty to active duty at that time, and it is doubtful that he would have been recalled under any circumstances."

(See Proceedings and Decision filed by Army Board for Correction of Military Records, decided April 17, 1974, filed October 18, 1974, page 7, Board Conclusion #2.)

The Court of Claims, in its' Opinion of June 27, 1975, followed up saying at page two, that:

"Though Third Army apparently wanted Plaintiff on active duty with it, the Board says there was little need to recall officers of his specialty in 1948 when he applied, We must presume this statement is based on fact and is not a fabrication."

The Third Army did in fact want the Petitioner on active duty with it, and even recommended Petitioner's approval to fill an existing opening at Fort Jackson, South Carolina. The request to the Adjutant General of the Army from the Third Army even contained the requisition number (AGD F-8) referring to the said opening. (See Defendant's Motion for Summary Judgment, filed March 7, 1972,Exhibit T, page 4, paragraph 2.)

The lower Court's presumption that the Board's conclusion was based on fact is faulty. The Board did not support its conclusion with fact. Overlooked by the Court of Claims was the fact that the Adjutant General of the Army determines what officers of each specialty are needed and how many "slots" there are to be filled at any one particular time. Nowhere in its proceedings did the Board refute the facts contained in Exhibit T (referred to above); or offer any in support of its' conclusions.

The Petitioner contends that the evidence, even when viewed most favorably for the Respondents, shows that there was a specific need to recall Petitioner, with his specialty, in 1948. The action of the Board in reaching their conclusion that there was little need to recall Petitioner in 1948 was unsupported

by the facts of this case. The action of the Court of Claims in dismissing Petitioner's Complaint based upon the Board's recommendation concerning the above issue is unjustified, and can only be corrected by the granting of this Writ.

III. IT WAS IMPROPER FOR THE COURT TO DISMISS PETITIONER'S COMPLAINT ON THE GROUND THAT IT WAS IMPOSSIBLE TO DETERMINE WHAT GRADE HE WOULD HAVE ATTAINED HAD HE BEEN ALLOWED TO RETAIN HIS COMMISSION.

The Petitioner originally prayed in his Complaint that he be held entitled to disability retirement in the grade of Major, later amending the same to the grade of Colonel.

The Army Board for Correction of Military Records stated:

"That if the applicant had been recalled to active duty in 1948 or 1950 in commissioned status, it is impossible to determine that he would have attained the rank of Colonel, since it is doubtful that he would have been retained on AD [Active Duty] in such status after the cessation of hostilities during the Korean Conflict period."

(See Proceedings and Decision filed by Army Board for Correction of Military Records decided April 17, 1974, filed October 18, 1974, page 8, Board Conclusion #4.)

The Court of Claims accepted the Board's conclusion, stating:

"As we read the ABCMR, ..., it would be impossible because too speculative to postulate a cons-

tructive active duty credit as an officer for this plaintiff from 1948 to 1966. This is what we wanted the Board to determine. ... If there was a need [to recall officers] in 1950, the Korean War period, it would be impossible to say how long plaintiff would have served or what rank he would have attained."

(Opinion of the Court of Claims, dated June 27, 1975, page 2.)

For the Court of Claims to use this reasoning as a basis for dismissing Petitioner's Complaint was improper. On June 5, 1975, in oral arguments before the Court, Petitioner waived his right to disability retirement

in the grade of Colonel; thereby mooting the issue of retirement as a Colonel. The Court, however, preferred to use the Board's conclusion as a further justification of its' dismissal of Petitioner's Complaint.

The Court of Claims disregards the statutory authority which is determinative on this point, namely, 10 U.S.C. 1372 (2).

The Petitioner contends that the evidence, even when viewed most favorably for the Respondents, shows that there was no real question or issue as to which grade Petitioner should have been entitled to medically retire. 10 U.S.C. 1372 (2) dictates the grade in this factual situation as Major. The action of the Board in concluding that it was impossible to determine what grade Petitioner would have attained had he been allowed to retain his

commission was arbitrary and capricious.

The action of the Court of Claims in dismissing Petitioner's Complaint based upon the Board's conclusion concerning the above issue was unjustified, and can only be corrected by the granting of this Writ.

CONCLUSION

This Court should review this case because the actions and inactions of the Army Board for Correction of Military Records and of the Court of Claims concerning disabled yeteran benefits are matters of substantial public importance and concern, For these reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Vincent P. McCauley
Attorney for Petitioner

Post Office Box 1884
Columbus, Georgia 31902

CERTIFICATE OF SERVICE

I, Vincent P. McCauley, certify that I am the Attorney for the Petitioner in the above and foregoing cause, and also certify that I have served three (3) copies of the above Petition upon the Solicitor General, Department of Justice, Washington, D. C., 20530, by depositing the same in the United States Mail, airmail, postage prepaid to the above address.

This the 26 day of September, 1975.

Vincent P. McCauley
Attorney for Petitioner

Post Office Box 1884
Columbus, Georgia 31902

Supreme Court, U. S.
FILED
OCT 2 1975
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

No. 75-5081

EMIL W. KAESERMAN,

Petitioner

vs.

THE UNITED STATES,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

APPENDIX TO THE ABOVE PETITION

VINCENT P. McCAULEY
POST OFFICE BOX 1884
COLUMBUS, GEORGIA 31902
ATTORNEY FOR PETITIONER

IN THE UNITED STATES COURT OF CLAIMS

No. 292-69

EMIL W. KAESERMAN

v.

THE UNITED STATES

Before NICHOLS, Judge, Presiding, KASHIWA and KUNZIG, Judges.

O R D E R

This case was originally briefed and argued before the full court on cross motions for summary judgment. By order dated June 1, 1973, the court with three judges dissenting, remanded the case to the Army Board for Correction of Military Records (ABCMR), 202 Ct. Cl. 1081. The suit is for commissioned officer's pay during a period of years when the plaintiff actually was employed as an enlisted man, having been rejected for return to active duty in the reserve officer rank he held. The circumstances included a 1947 diagnosis of plaintiff as suffering from herniated nucleus pulposus, which the Surgeon General in 1965 held was and had been erroneous. This diagnosis did not disqualify plaintiff from active duty as an enlisted man but for reasons not fully or at all explained, did disqualify him as an officer in a rank he had previously held. See the prior order for further details. The remand did not dispose of the motions, and such disposal is now possible. The parties have filed supplemental briefs and argued the case orally before this panel. Since the oral argument plaintiff has filed a motion, which we have allowed, for leave to file another supplemental brief and such further brief has been considered.

The ABCMR took the case as directed and granted plaintiff a hearing. It obtained ex parte a further report from the Surgeon General. In light of that further report, it is not clear as it previously appeared that the disqualification decisions of 1948 and later relating to plaintiff's physical fitness for active duty as an officer were in error. The ABCMR finds in effect they were correct. The plaintiff, taking the opposite side of the coin, also contended to the ABCMR that when retired he was disabled and should have received a disability retirement as a Colonel.

As we read the ABCMR, even if the medical evidence in the case were unchanged from when it was before us previously, it would be impossible because too speculative to postulate a constructive active duty credit as an officer

for this plaintiff from 1948 to 1966. This is what we wanted the Board to determine. Though 3d Army apparently wanted plaintiff on active duty with it, the Board says there was little need to recall officers of his specialty in 1948 when he applied. We must presume this statement is based on fact and is not a fabrication. If there was a need in 1950, the Korean War period, it would be impossible to say how long plaintiff would have served or what rank he would have attained. There is no way we can say the Board was arbitrary and capricious in drawing this conclusion as to a matter within its expertise. Assuming the Board to be unwilling to exercise its discretion favorably in the premises, there is no way this court can constructively and retroactively order active duty or promotions in rank. Abruzzo v. United States, 206 Ct. Cl. (No. 141-73, decided April 16, 1975.) If the

discretion were ours, how we would exercise it is not for consideration here.

The claim that plaintiff was disabled on retirement in 1966 was apparently an attempt to exploit plaintiff's repeated rejections on physical grounds as a kind of estoppel. Plaintiff applied for retirement on longevity grounds and a medical Board at that time found he was fit for further active duty. We do not think the ABCMR was arbitrary and capricious in denying a disability retirement, especially since plaintiff linked this claim, inextricably so far as the ABCMR decision reveals, with the contention he should have been retired as a Colonel. The rank at retirement and the character of retirement are logically two distinct issues, but if the applicant for relief links them together as one, the ABCMR is not arbi-

trary and capricious in doing the same.

We do not think the ABCMR committed any error reversible by us in obtaining ex parte a further medical report from the Surgeon General, for use in considering plaintiff's requests for discretionary relief. Merson v. United States, 173 Ct. Cl. 92, 97-98 (1965).

The 1973 order in this case anticipated Testan v. United States, 205 Ct. Cl. 330, 499 F. 2d 690 (1974), cert. granted, 420 U. S. 923 (1975), in holding that under authority of Pub. L. 92-415 amending 28 U.S.C. §1491, we could remand a case to an administrative body for consideration or reconsideration of relief we could not ourselves directly grant because essentially discretionary, when a favorable decision below would generate a valid money claim. Pending the outcome of Testan, in the Supreme

Court, this order is not to be read as affirming or disaffirming our belief in the existence of such power.

In view of the foregoing, plaintiff's motion for summary judgment is denied, defendant's motion for summary judgment is granted, and the petition is dismissed.

BY THE COURT

JUN 27 1975

Philip Nichols Jr

Philip Nichols, Jr.,
Judge, Presiding.

KUNZIG, Judge, concurs in the result.

CERTIFICATE OF SERVICE

I, Vincent P. McCauley, certify that I am the Attorney for the Petitioner in the above and foregoing cause, and also certify that I have served three (3) copies of the above Appendix upon the Solicitor General, Department of Justice, Washington, D. C., 20530, by depositing the same in the United States Mail, postage prepaid to the above address.

This the 2nd day of October, 1975.

Vincent P. McCauley

Vincent P. McCauley
Attorney for Petitioner

Post Office Box 1884
Columbus, Georgia 31902

No. 75-508

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

EMIL W. KAEDERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-508

EMIL W. KAESERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the Court of Claims erred in holding that the denial of his claims by the Army Board for the Correction of Military Records was not arbitrary or capricious, and that accordingly, he was not entitled to back pay and disability retirement pay.

Petitioner served as an officer in the Army of the United States during World War II. In 1946, he received a terminal leave promotion to major but remained on active duty as a captain until 1948 when

he was released at his request, at which time his status reverted to that of a major in the United States Army Reserve. He subsequently unsuccessfully sought recall to active duty as a captain. Petitioner then enlisted in the Regular Army as a master sergeant. He re-enlisted periodically until his retirement as a master sergeant in 1966. His retirement was based on length of service.[1]

During his years of service in the Regular Army, petitioner unsuccessfully sought recall to active duty as an officer, retirement for physical disability, and "correction" of his military records to show that he should have been retired in 1948 as a major on grounds of physical disability. Following his retirement, petitioner was awarded a 30 percent disability rating by the Veterans Administration, and he thereupon requested "correction" of his military records to show his retirement on grounds of physical disability rather than length of service. This request was denied by the Army Board for the Correction of Military Records.

Petitioner then filed this action for review in the Court of Claims. The court remanded to the Board for a hearing on petitioner's claims. The Board denied relief after a hearing and consideration of a medical report from the Surgeon General. The Board concluded that petitioner's 30 percent disability, which was based upon a physical condition dating from World War II, had been sufficient to preclude

[1] Petitioner had earlier retired from his reserve commission after being passed over for promotion.

his recall to active duty as an officer but was not sufficient to justify discharge for physical disability once he had re-enlisted. The Court of Claims affirmed those findings as not arbitrary or capricious (Pet. App. 1-7).

The decision of the Court of Claims on the merits was correct[2] and the essentially factual questions raised by petitioner warrant no further review.

Petitioner seeks back pay and accrued retirement benefits on alternative grounds. First, if he was physically fit in 1948, he argues that he should have been recalled to duty as an officer and is therefore entitled to an officer's pay for the entire period of his service as an enlisted man. Second, if he was not fit to serve as an officer, he claims that it was because he was so disabled as of 1948 that he should have been retired, either then or in 1966, in the highest temporary grade, that of major, in which he served satisfactorily.[3]

The Board correctly ruled that in 1948 there was little need to recall officers of petitioner's grade and military occupational speciality (Conclusion 2). Thus

[2] We do not here concede that the Court of Claims had jurisdiction over this case, which does not involve a claim to "actual, presently due money damages from the United States." *United States* v. *King*, 395 U.S. 1, 3. See our brief in *United States* v. *Testan and Zarrilli*, No. 74-753, argued November 12, 1975.

[3] The amended petition in the Court of Claims sought disability retirement pay as a major from January 1966. Petitioner claimed before the Board that he was entitled to retirement pay as a colonel, but he later abandoned that claim (Pet. 22-25).

even if petitioner had been medically fit for recall, he was not entitled to recall. Moreover, as the court below observed, even if petitioner had been recalled as an officer, "it would be impossible to say how long [petitioner] would have served or what rank he would have attained" (Pet. App. 4).

In any event, petitioner was not medically qualified for recall as an officer. He suffered from a disabling back condition (Findings 2(z)). No statute requires the Army to fill its rolls with officers having physical limitations. Moreover, as the Board noted, even during the Korean War, when there was a greater need for officers, "not all individuals in [petitioner's] circumstances received favorable consideration of their requests for active duty, and the impression that he had a [disabling back condition] was sufficient to disqualify him for active duty in commissioned status" (Conclusion 3). As the Board also observed, however, this disqualification from recall as an active duty officer did not establish that he was disabled for the purpose of serving as an enlisted man (Findings 2(p), (q)).

It follows that even though the Surgeon General's 1974 report found that petitioner "was not medically qualified for entry on [active duty] commencing in 1948" by reason of his back condition (Findings 2 (z)), he nevertheless was medically fit to continue service as an enlisted man and therefore was properly retired for longevity rather than disability in 1966 (Conclusion 5). Since he was not retired for disability, he is not entitled to retirement pay under his former rank of major.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

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